IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0354

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DANNY SARTAIN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, The Honorable Mike Salvagni, Presiding

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STATEMENT OF THE ISSUES FOR REVIEW

1. Was Sartain, who was incarcerated for 357 days pending his jury trial denied his constitutional right to a speedy trial; and, upon de novo review of the record, was the district court's conclusion that he had "acquiesced" in the waiver of this fundamental right and that he was not prejudiced by the lengthy pre-trial incarceration error?

2. Was Sartain's trial counsel, who failed to call any witnesses on his behalf; who failed to provide an opening statement; who failed to challenge Sartain's identification following an unreliable "show-up;" who failed to challenge Sartain's illegal arrest; who failed to file to suppress statements made by Sartain following his arrest; and who failed to object to improper comments and arguments of the prosecutor; ineffective? And if so, was Sartain prejudiced by the errors of his counsel?

STATEMENT OF THE CASE

On March 25, 2008, Danny Sartain (Sartain), was charged with Burglary. Sartain was appointed an attorney and arraigned in district court on July 7, 2008. (D.C. Docs. 15, 19.) An omnibus hearing took place on August 11, 2008. (8/11/08 Tr., Court's Exhibit A, attached to D.C. Doc. 52.) Sartain, who was in custody, was not transported for the hearing. (D.C. Doc. 22.) Sartain's trial attorney did not file any pretrial motions on Sartain's behalf, prior to the omnibus

hearing. At the hearing, Sartain's attorney told the district court that he needed three days for trial because of the number of witnesses that he was going to call and that his client was "not going to be happy" if he did not subpoena all of the witnesses. (8/11/08 Tr. at 23-24, 26.) Based on defense counsel's representations, the district court set the trial to begin seven months later; or almost one year after Sartain's arrest, on March 17, 2009.

On January 8, 2009, Sartain filed a motion to dismiss, alleging a violation of his right to a speedy trial. (D.C. Doc. 25.) The district court held an evidentiary hearing on this motion on February 24, 2009. Unlike the omnibus hearing, Sartain was transported for the evidentiary hearing. The district court denied Sartain's motion to dismiss by order dated March 9, 2009. (D.C. Doc. 52.) The next day, or one week before trial, Sartain's attorney filed several motions in limine, challenging the admission of evidence related to footprints, toolbar marks, a dog search, and other issues. (D.C. Doc. 53.) The district court addressed these motions at the final pre-trial conference held on March 16, 2009, but did not rule on the motions pending the presentation of evidence. (3/16/09 Tr. at 32.)

Sartain's jury trial took place over two days--March 17-18, 2009. The State presented seven witnesses and admitted thirty-three exhibits. Sartain's defense attorney did not call any witnesses on Sartain's behalf and did not provide an

opening statement. Although Sartain had expressed a desire to testify on his own behalf, he was not called to testify. (3/18/09 Tr. at 136, 139.)

After Sartain was convicted, he was sentenced as a persistent felony offender to a term of forty years at the Montana State Prison. (D.C. Doc. 69.) Sartain filed a timely notice of appeal and now files his opening brief on appeal.

STATEMENT OF THE FACTS

Sartain was charged with the offense of burglary, in violation of Mont. Code Ann. § 45-6-204. According to the Affidavit of Probable Cause filed in the case, on March 25, 2008, at approximately 1:30 p.m., the Bozeman Police Department received a 911 call reporting a burglary. (D. C. Doc. 1.) Bozeman resident Timothy Hop (Hop), called to report he had surprised an intruder in his home in the 100 block of East Aspen Drive. Hop told officers that when he came home from a cross-country skiing trip; he noticed the front door to his apartment was slightly ajar. (D.C. Doc. 1; 3/17/09 Tr. at 86.) Hop lived in a tri-plex that housed three separate apartments. (3/17/09 Tr. at 83.) Hop said when he saw the door ajar; he reached to push it open. As he did, someone pushed the door closed from inside and locked it. Hop unlocked the door and entered. (3/17/09 Tr. at 87.) As he entered, Hop said he saw an adult male exiting from the back door. Hop testified he and the man "got a good look at each other." (3/17/09 Tr. at 88.) When asked to explain what a "good look" meant, Hop said: "Well, we made eye

contact." Later, Hop clarified that the look he got was "[a]s good a look as you get in a blink of an eye." (3/17/09 Tr. at 124.)

Hop saw the man go out the back door. Hop entered his residence, retrieved a Smith and Wesson .38 caliber pistol from his kitchen and followed him. (3/17/09 Tr. at 90.) Hop went to the back door and yelled at the man, who had reached the back fence. According to Hop, the man turned and looked at him. Hop said he fired a warning shot past the man. According to Hop, the man turned, and then went through the back gate and around the corner of the building. Hop went back through his apartment and out the front door to see if he could see the man at the front of the building, but did not see him. Hop then called 911 on his cell phone and made a report of the incident. (3/17/09 Tr. at 95.)

Officers were dispatched to the area. According to dispatch records, Hop had described the suspect as a "big guy, white male, about 6 feet, 180-200 pounds with a light colored ball cap and light sweatshirt." (3/17/09 Tr. at 188.) At 1:47 p.m., or approximately seventeen minutes after the 911 call, Officer Cory Klumb observed a man, later identified as Sartain walking briskly, or trotting, south on North Black Avenue. At the same time, Officer Klumb also observed another man standing on the sidewalk, looking southbound. Officer Klumb pulled up next to the man and asked him what he was looking at. (3/17/09 Tr. at 189.) This man, later identified as Schutz, told Klumb he was watching Sartain because Sartain

had just jumped the fence in his backyard and had cut through his neighbor's lawn. Officer Klumb, believing Sartain to be the suspect, notified other officers by radio and drove his car towards Sartain. Officer Klumb described his initial encounter with Sartain as follows:

> I drove down the street as fast as I could, had the door open before I had my car in park, hit the brakes, slid to a stop, exited my patrol car as quick as I could. I had my weapon drawn. I pointed it at the suspect. I told him to drop what he had in his hand. He had an object in his hand. It quickly became apparent that the object was a cell phone. . . .

(3/17/09 Tr. at 190.)

Officer Klumb ordered Sartain to his knees and placed him in handcuffs. He then searched Sartain for weapons. Officer Klumb testified that Sartain was "breathing hard as if he had been running." (3/17/09 Tr. at 193.) Officer Klumb testified that when he felt Sartain's chest, he could "actually feel his heartbeat." Officer Klumb arrested Sartain and placed him in the back of his patrol car. (D.C. Doc. 1 at 2.) Sartain was arrested several blocks away from the Hop residence.

Show-up Identification

After Sartain was arrested, Officer Klumb transported him to the residence on East Aspen for a "show-up" identification. (3/17/09 Tr. at 207.) Upon responding to Hop's residence, other officers had learned that a neighbor to Hop, Kristi Helsper (Helsper), had looked out her window when she had heard a noise and had observed a man running down the sidewalk. (3/17/09 Tr. at 156.)

Officers brought Sartain to Hop's residence, and asked both Hop and Helsper (separately) if they could identify him. (3/17/09 Tr. at 167.) To be viewed by Hop and Helsper, officers had Sartain step out of the back of the patrol car with his hands behind his back, handcuffed. (3/17/09 Tr. at 111, 167.) At the time, neither Hop nor Helsper were able to positively identify Sartain, but both testified that his general build and clothing seemed to match the description of the person they saw. (3/17/09 Tr. at 112, 134, 160, 167.)

After the "show-up," Sartain was transported to the Bozeman Law and Justice Center where he was interviewed by Detective Knight. (3/17/09 Tr. at 209, 238.) No motions challenging the "show-up" identification or seeking to suppress statements made by Sartain to Detective Knight after Sartain's warrantless arrest were ever filed. Included in the statements provided by Sartain to Detective Knight was the admission that Sartain's car was parked across the street from the Hop residence. (3/17/09 Tr. at 239.)

Omnibus Hearing

On August 11, 2008, the district court conducted an omnibus hearing. Sartain, who was incarcerated at the Montana State Prison, was not transported to Gallatin County for the hearing. No waiver of his appearance was filed with the district court. (See generally, district court docket.)

At the hearing, the State indicated its intent to file a notice to treat Sartain as a Persistent Felony Offender. (8/11/08 Tr. at 18-19.) The State did not have the notice prepared prior to the hearing, and told the district court that they would be filing it later. The district court asked Sartain's defense attorney if he agreed, because, as noted by the district court, "the statute says on or before the Omnibus hearing." The prosecutor offered to go type the notice, and defense counsel stated, on the record:

> [Defense Counsel]: I know. You know, **I hate to do this to you, but with this guy - -**
>
> [Prosecutor]: All right. Your Honor, if you could continue this to the end, I'll go type up a Persistent Felony Offender Notice.
>
> THE COURT: All right.
>
> [Defense Counsel]: **It's just because he's - -**
>
> [Prosecutor]: That's fine.

(8/11/08 Tr. at 19, emphasis added.)

At the omnibus hearing, there was extensive discussion as to the setting of the trial date. Sartain's defense counsel, who was in the National Guard, was not available for the month of September. (8/11/08 Tr. at 24-25.) The State represented that the case was a "one-day trial" case and that they could be done with testimony in three hours with two witnesses. (8/11/08 Tr. at 22.) Defense counsel indicated that as far as he was concerned, there was not a "speedy issue" as

his client was in custody at the Montana State Prison. Sartain was on parole when arrested and his counsel (erroneously) believed his parole had been revoked. (8/11/08 Tr. at 23; *see also*, 2/24/09 Tr. at 4-8.) Defense counsel indicated that his "real issue" was that his client would not "be happy" if he did not subpoena all of the witnesses involved and subject them to cross-examination. (8/11/08 Tr. at 23-24.) When discussing setting the trial in March, the prosecutor commented:

> So basically, the additional time would benefit the Defendant? Because if that's the case, then that's the case and we can put that on the record. That's - - then I'm okay with a March date.
>
> **[Defense counsel]: Well, see, we could do that. *You could say I'm not going to subpoena all these people and I could say I'm going to because I want them here*. We could do it that way.**
>
> [Prosecutor]: And then we could take March.

(8/11/08 Tr. at 24, emphasis and double emphasis added.)

Sartain's defense counsel then told the district court:

> So the State's representing to the Court that they think they can make their case with one or two witnesses and I'm saying that I would subpoena all parties involved, but that would take longer than a day. And so that being the case, I would request the three-day setting.

(8/11/08 Tr. at 26.)

Based on the representations of counsel, the trial court set the trial for a three day setting in March 2009, which was almost a year after Sartain's arrest. (D.C. Doc. 24.)

Speedy Trial Motion.

On January 8, 2009, Sartain filed a Motion to Dismiss and Brief in Support. (D.C. Doc. 25.) The basis of Sartain's motion was that the case should be dismissed because he had been denied his constitutional right to a speedy trial. On February 24, 2009, the district court held a hearing on Sartain's motion. (2/24/09 Tr.; D.C. Doc. 25.) Unlike the omnibus hearing, Sartain was transported to the evidentiary hearing from the Montana State Prison. Sartain was the only witness called at the hearing on his motion to dismiss.

At the hearing on the motion to dismiss, the district court took judicial notice of the transcript from the Omnibus Hearing that took place on August 11, 2008, and attached a copy of this transcript to its decision denying the motion to dismiss. (See 8/11/08 Tr., attached as Court's Exhibit A to D.C. Doc. 52.)

At the evidentiary hearing, when the district court questioned counsel why he was raising a speedy trial issue when earlier, he had indicated there would not be an issue, defense counsel stated:

> I think the best answer I have for you, Your Honor, is that while I was in Court having a discussion with you and agreeing, my client apparently didn't agree. And so and he wasn't happy with the outcome and so at his behest the Court has a speedy trial motion before it.

(2/24/09 Tr. at 46.)

Sartain did not execute a written waiver of his right to a speedy trial. He was not transported to his omnibus hearing and did not waive this right on the record.

Final Pre-trial Conference

On March 16, 2009, the district court held a final pretrial conference. At that time, trial counsel for Sartain informed the district court that he was going to waive opening statement. (3/17/09 Tr. at 5.) Later, counsel told the court that he would need no more than thirty minutes for this statement. Counsel did eventually waive opening statement and did not provide the jury with the defense theory of the case until closing arguments. (3/17/09 and 3/18/09 Tr.)

At the final pretrial hearing on March 16, 2009, the district court addressed the motions in limine filed on Sartain's behalf. (3/16/09 Tr. at 32.) The State had not filed any notice that it would seek to present expert testimony. Sartain sought to limit the State from presenting expert testimony as to footprints, the presence of pry marks at the Hop residence or testimony about a dog search. The State responded by claiming that the testimony as to those issues was lay testimony, not expert testimony, and so could be admitted. After extensive discussion, the district court took the defense motions in limine under advisement. (3/16/09 Tr. at 32-52, 54-63.) The district court noted that it had not been presented with any evidence so as to be able to rule on the motions. When explaining its decision, the district

court also commented that the defense had the right to appeal decisions made by the court which occurred during the trial while "[t]he State doesn't always have that right, if ever." (3/16/09 Tr. at 54.)

Trial

At the trial, the State presented testimony from seven different witnesses and introduced thirty-three exhibits into evidence. The Defense did not call any witnesses and only offered one exhibit into evidence. The exhibit offered by *Sartain's counsel* was a photograph of Sartain taken shortly after he was arrested, sitting with his hands behind his back, handcuffed, in the back seat of a patrol car. (3/17/09 Tr. at 212, Ex. A.) Although Sartain had expressed a desire to testify on his own behalf at the trial, he was not called to testify.

During the trial, the State presented testimony from four witnesses. Without objection, the State identified all of these witnesses as "eye-witnesses." As Hop was the only witness to have observed the intruder in his home, he arguably was the *only* eyewitness. Helsper testified as to her identification of Sartain at the show-up. In a statement provided to police following the show-up, Helsper was able to provide additional details about the person she had observed. Helsper testified that she had provided more detail, because she was trying to "help them as much as possible and I was nervous." (3/17/09 Tr. at 167.) Two of the State witnesses testified as to their identification of Sartain as he was observed in the

backyard of a residence located several blocks away from the Hop residence. The State sought to tie Sartain to the Hop residence through the testimony of law enforcement officers, who testified that the tread of Sartain's shoes and the tread of shoeprints left in the snow in the backyard of the Hop residence were "similar." Numerous photographs depicting the shoe prints were introduced into evidence, along with Sartain's boots. The State also presented testimony from a dog handler, who testified that his dog tracked the scent of the intruder to a location where a pry bar was located. Again, the State presented testimony that footprints located "near" where the pry bar was located were similar to the tread in the boots worn by Sartain.[1] The State also presented testimony that marks located on the front and back doors of the Hop residence could have been made by the pry bar that was located in an alley following the dog search.

Sartain's counsel did not object to Hop's identification of Sartain at the trial. During cross-examination, trial counsel elicited the following testimony from Hop:

> Q. So you're (sic) testimony today is that you're absolutely 100 percent positive that Mr. Sartain is the individual that was in you house.
> A. True.
> Q. Even though you couldn't positively ID him at the scene of the crime.
> A. True.

[1] Testimony as to the location of the pry bar was suspect. Detective Knight originally testified as to its location when establishing foundation for photographs; but later retracted this testimony. (Tr. 3/18/09, 36, 49-51.)

(3/18/09 Tr. at 135.)

Closing Arguments

Following the settlement of jury instructions, both the State and the Defense presented closing arguments. During the State's closing, the prosecution made the following argument:

> I'll give credit where credit is due. [Defense counsel] is a wonderful defense attorney. I have the utmost respect for him. **A criminal defense attorney's job, if it's anything, is to muddy the waters. Muddy the waters, create confusion, and he did a good job of that.** But at the end of the day there are four people involved in this, they are direct eyewitnesses. . . .

(3/18/09 Tr. at 170, emphasis added.)

During closing argument on behalf of Sartain, his attorney made the following argument:

> So I encourage you to go back there and take a good look at the State's evidence, take a look at his eyewitness testimony, read the jury instructions because they're helpful, and at the end of the day find Mr. Sartain is innocent. He was in the wrong place at the wrong time. Not guilty. I thank you for your time.

(3/19/2009 Tr. at 189.)

The jury returned a verdict of guilty.

Sartain was sentenced as a persistent felony offender and received a forty-year sentence at the Montana State Prison, to run concurrent with a sentence he was currently serving out of Flathead County. (Sent. Tr. at 58.)

SUMMARY OF ARGUMENT

The district court erred in failing to grant Sartain's motion to dismiss for violation of his right to speedy trial. The district court relied on the representations of trial counsel when setting Sartain's jury trial, 357 days after his arrest. Sartain was not transported for his omnibus hearing and did not waive his right to a speedy trial, in writing, or otherwise. The district court's findings and conclusions as to Sartain's response to the delay and whether he was prejudiced by the delay were either not supported by substantial credible evidence; the court misapprehended the effect of the evidence; and/or a de novo review of the record will leave this Court with the definite and firm conviction that a mistake has been made. Sartain's right to a speedy trial was violated and this case must be dismissed.

In the event that this Court does not dismiss this case in violation of Sartain's constitutional right to a speedy trial, Sartain is entitled to a new trial based on the ineffective assistance of his trial counsel. Sartain's counsel did not file critical pre-trial motions on his behalf, leading to irreparable identification of Sartain as the suspect in the Hop burglary. Sartain's attorney failed to file pretrial motions challenging his warrantless arrest and failed to file a motion to suppress statements made by Sartain following this arrest. Sartain's attorney did not properly object to statements made by the prosecution and other state's witnesses during the trial and failed to act effectively as Sartain's advocate. Although

ineffective assistance of counsel claims are often better addressed in post-conviction proceedings, a review of the record in this case will "undermine confidence in the outcome" and demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would very likely have been different.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING SARTAIN'S MOTION TO DISMISS FOR A VIOLATION OF HIS RIGHT TO A SPEEDY TRIAL.

A. Standard of Review

This Court reviews the factual findings underlying a district court's speedy trial ruling to determine whether those findings are clearly erroneous. *State v. Ariegwe*, 2007 MT 204, ¶ 119, 338 Mont. 442, 67 P.3d 815. Findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made. *Ariegwe*, ¶ 119. This Court reviews a district court's determination of whether a speedy trial violation occurred, de novo, because it is a conclusion of constitutional law. *Ariegwe*, ¶ 119.

B. Discussion

The Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution, guarantee criminal defendants the right to a speedy trial. In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court set forth the approach under which the Sixth Amendment right to a speedy trial is to be evaluated. Although guided by *Barker's* general approach for analyzing speedy trial claims, this Court has grounded its own speedy trial analysis on Article II, Section 24 of the Montana Constitution, which provides a speedy trial guarantee that is independent of the Sixth and Fourteenth Amendments. See *Arigewe*, ¶ 35. As recognized in *Arigewe*, because the federal constitution establishes the floor and not the apex of constitutional rights, state action that does not violate a federal constitutional guarantee may, nevertheless, violate Montana's own Constitution. *Arigewe*, ¶ 35 (internal citations omitted).

When confronted with a speedy trial claim, this Court considers the following four factors to determine if the defendant's constitutional right has been violated: (1) the length of the delay; (2) the reasons for the delay; (3) the accused's responses to the delay; and (4) the prejudice caused by delay to the accused. See *State v. Billman*, 2008 MT 326, ¶ 11, 346 Mont. 118, 194 P.3d 58 (summarizing the speedy trial test laid out in *Ariegwe*). Under this test, no single factor is

indispensable or dispositive. Rather, the factors must be considered together with such other circumstances as may be relevant. *Ariegwe*, ¶ 102.

1. Factors One and Two – Length and Reasons for Delay.

In the present case, the district court analyzed Sartain's motion to dismiss under the four factors identified in *Arigewe*. As to factor one, the length of delay, the district court determined the length to be 357 days. As to factor two, the reasons of delay, the district court attributed 332 days to the State (103 days due to State's lack of diligence and 218 days as institutional delay). Of the total 357 days, the district court attributed 25 days to Sartain for the time that his attorney was unavailable for trial in September 2008.

Sartain does not challenge the district court's findings as to the first two factors. Sartain does challenges the district court's factual findings and conclusions of law under factors three (accused's response to delay) and four (prejudice to accused), because the analysis as to these two factors is flawed. The district court's analysis as to these two factors is flawed because it rests on the erroneous assumption that 1) acquiescence in the loss of a fundamental right can be presumed from a silent record and 2) pretrial incarceration for a defendant who has previously served time in prison cannot be oppressive.

2. Factor Three: Accused's Response to Delay.

The district court concluded that Sartain's response to the delay in this case weighed heavily in favor of the State, because Sartain had "acquiesced" in the delay. As to this factor, the district court relied on the transcript from the omnibus hearing that took place on August 11, 2008. At the omnibus hearing, Sartain's trial counsel told the district court that he specifically requested a three-day trial setting because of the number of witnesses that he planned on calling. Obviously, when analyzing factor three, the district court did not have the benefit of the actual record that was made during Sartain's jury trial. As Sartain's counsel did not call a single witness on his behalf, this representation was seriously inaccurate.

Findings of fact are clearly erroneous if they are not supported by substantial credible evidence, if the court has misapprehended the effect of the evidence, or if a review of the record leaves this Court with the definite and firm conviction that a mistake has been made. *Ariegwe*, ¶ 119.

The view that an accused loses his right to a speedy trial by silence or inaction is open to question on at least three grounds. *See e.g.*, *Dickey v. Florida*, 398 U.S. 30, 49 (1970) (concurring opinion, J. Brennan, with J. Marshall). First, this view rests on an unrealistic assumption that delay in criminal cases is universally welcomed by defendants. While it is true that delay may be welcomed by an accused, especially if the accused greatly fears the possible consequences of

his trial; an accused may just as easily object to delay for its "prolongation of the time in which he must live in uncertainty, carrying the emotional and financial burdens of accusation, and possessing the conditioned freedom of a potential felon." *Dickey*, 398 U.S. at 49. The passage of time "may threaten the ability of both the defendant and the government to prepare and present a complete case; in this regard, delay does not inherently benefit the accused any more than it does the prosecution."

Second, the equation of silence or inaction, with waiver is a "fiction" that has been categorically rejected when other fundamental rights are at stake. *Dickey*, 398 U.S. at 49. Waiver, as it applies to fundamental constitutional rights, has long been defined as the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Courts are continually instructed to "indulge every reasonable presumption against waiver." Courts should not presume acquiescence in the loss of fundamental rights. *Dickey*, 398 U.S. at 50. The right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967).

Third, as recognized by Justice Brennan in *Dickey,* implying waiver from silence or inaction misallocates the burden of ensuring a speedy trial. *Dickey*, 398 U.S. at 50. The accused has no duty to bring on his trial. Delay may spring from a

refusal by other branches of government to provide these agencies and the judiciary with the resources necessary for speedy trials. An accused may waive his constitutional right to a speedy trial provided such a waiver is knowingly or voluntarily made. *Barker*, 407 U.S. at 529. However, the burden to demonstrate waiver should be on the State and waiver should not be presumed from a silent record.

In the present case, Sartain, who was in custody, was not transported to the omnibus hearing. At that hearing, Sartain's attorney made several comments and representations on the record which viewed objectively, raise a serious red flag as to whether his attorney was putting the interests of his client, first. When asked whether he objected to the State not filing a timely notice of persistent felony offender, Sartain's counsel said:

> [Defense Counsel]: I know. You know, I hate to do this to you, **but with this guy - -**
>
> [Prosecutor]: All right. Your Honor, if you could continue this to the end, I'll go type up a Persistent Felony Offender Notice.
>
> THE COURT: All right.
>
> [Defense Counsel]: **It's just because he's - -**
>
> [Prosecutor]: That's fine.

(8/11/08 Tr. at 19, emphasis added.)

Defense counsel erroneously informed the district court that as far as he was concerned, there was not a "speedy issue," because "he's [Sartain] is in custody and his parole was revoked, so how can there be a - - see, I'm with you on that. I don't - -." (8/11/08 Tr. at 23.) As established later at the evidentiary hearing, Sartain's parole had not been revoked, so defense counsel's representation to the contrary was in error. (D.C. Doc. 52 at 19-20.) Defense counsel also indicated that his client would not "be happy" if he did not subpoena all of the witnesses involved and subject them to cross-examination. (8/11/08 Tr. at 23-24.) Later, defense counsel made the following comment to the prosecutor:

> [Defense counsel]: Well, see, we could do that. You could say I'm not going to subpoena all these people and I could say I'm going to because I want them here. We could do it that way.
>
> [Prosecutor]: And then we could take March.

(8/11/08 Tr. at 24.)

Under the facts of this case, and in the absence of a written waiver or other affirmative evidence, the district court's conclusion that Sartain "acquiesced" in the delay is not supported by substantial evidence and was clearly erroneous. Contrary to defense counsel's earlier representations, he did not subpoena any witnesses on Sartain's behalf and a three-day trial setting was not for the benefit of the defense. Furthermore, even if a three-day setting had been necessary for the defense, there is no indication (in August) why the first three-day setting available

was not until March of the following year. The fact that a court docket is overcrowded does not excuse the State from providing resources necessary (including resources for the court and for the defense) to provide a speedy trial. *State v. Steward*, 168 Mont. 385, 390, 543 P.2d 178, 181 (1975). Although he was the one to bear the brunt of the delay, Sartain was not responsible and he certainly did not "acquiesce" in the delay.

3. Factor Four: Prejudice to the Accused

Under the fourth speedy trial factor, this Court must examine whether the pretrial delay has prejudiced the defendant in light of the interests the speedy trial right protects: 1) prevention of oppressive pretrial incarceration; 2) minimizing the accused's anxiety and concern; and 3) limiting the possibility that pretrial delay will impair the accused's defense.

First, as to the prevention of oppressive pretrial incarceration: the use of the word "oppressive" to modify the phrase "pretrial incarceration" appears to be superfluous. It should go without saying that when a defendant has not yet been convicted, it is very likely that <u>any</u> period of pretrial incarceration will be oppressive--at least viewed from the perspective of the defendant. The degree of oppressiveness will obviously increase with the length of incarceration. In the present case, Sartain spent 357 days in pretrial incarceration, 332 of those days were attributed to the State. The length of Sartain's pretrial incarceration, <u>alone</u>,

establishes prejudice. See *Ariegwe*, ¶ 88 (reaffirming that prejudice may be established under "any or all" of the three interests served by such right).

In the present case, the district court concluded that Sartain's pretrial incarceration had not been unduly oppressive in light of Sartain's criminal history and the fact that he had previously spent a considerable amount of time in the prison. It cannot be assumed that a person with a criminal history is less likely to suffer from oppressive pretrial incarceration. This conclusion ignores Sartain's compelling testimony as to the conditions of his confinement, the efforts he made to rehabilitate himself following his release from prison and the subsequent loss of everything he had achieved due to his lengthy pretrial incarceration. (2/24/08 Tr. at 18-21.) This conclusion also ignores that fact that even if Sartain's parole had been revoked, as his attorney erroneously believed, Sartain was still entitled to the explicit constitutional guarantee of a speedy trial. See the comments of Justice Stewart in *Smith v. Hooey*, 393 U.S. 374 (1969):

> At first blush it might appear that a man already in prison under a lawful sentence is hardly in a position to suffer from 'undue and oppressive incarceration prior to trial.' But the fact is that delay in bringing such a person to trial on a pending charge may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge. First, the possibility that the defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed. Secondly, under procedures now widely practiced, the duration of his present imprisonment may be increased, and the conditions under which he must serve his sentence greatly worsened, by the pendency of another criminal charge outstanding

> against him. And while it might be argued that a person already in prison would be less likely than others to be affected by 'anxiety and concern accompanying public accusation,' there is reason to believe that an outstanding untried charge (of which even a convict may, of course, be innocent) can have fully as depressive an effect upon a prisoner as upon a person who is at large.
>
> Finally, it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' are markedly increased when the accused is incarcerated in another jurisdiction. Confined in a prison, perhaps far from the place where the offense covered by the outstanding charge allegedly took place, his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time.

Hooey, 393 U.S. at 378-380; *but see*, *State v. Bowser*, 2005 MT 279, ¶ 15, 329 Mont. 218, 123 P.3d 230 (incarceration on different charges negates any prejudice while awaiting trial).

When discussing whether Sartain suffered anxiety and concern that was aggravated due to his pretrial incarceration, the district court did not find prejudice to Sartain due to its conclusion that Sartain had "acquiesced" in the delay. (D.C. Doc. 52 at 21.) Again, this conclusion is suspect based on the lack of a signed waiver of his right to speedy trial by Sartain; his absence at the omnibus hearing; as well as the questionable representations made by his own counsel during this hearing.

In analyzing a motion to dismiss for violation of a right to speedy trial, the Court is also to consider whether the pretrial delay impaired the defense. In *Barker*, the Supreme Court characterized this interest as "the most serious" of the interests that the speedy trial right was designed to protect, "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532. At the same time, this form of prejudice can be the most difficult to prove and so is not essential to every speedy trial claim. See *Barker*, 407 U.S. at 533.

In the present case, the district court noted that Sartain had claimed that his defense was impaired because it was difficult to meet with his counsel and to prepare a defense. Sartain testified as to the difficulties in meeting with his attorney while he was incarcerated at the Montana State Prison and the process that would take place when he did meet with him:

> A. If I meet with you, I am strip searched first and out.
>
> Q. What - - describe that process, please.
>
> A. Strip searching is where I have to remove every article of clothing including socks, underwear. And then asked to separate genitalia, lift it, squat and cough to make sure nothing has been hidden. Basically everything except a cavity search.
>
> Q. Okay. And you go through - - that experience happens every time somebody comes to see you?

A. Whether it's you, my family or my wife.

(2/24/08 Tr. at 22-23.)

The fact that communication between Sartain and his counsel was impeded by the delay is demonstrated in other areas of the record as well. For instance, at the close of the State's case, when discussing whether Sartain would take the stand in his own defense, the following discussion took place:

> (In Chambers)
>
> THE COURT: Let the record show we're outside the presence of the jury. The Defendant and his counsel are present, the State's attorney is present.
>
> [Defense Counsel], what is your plan here now?
>
> [Defense Counsel]: (Directed to Mr. Sartain) Do you wish to testify or not?
>
> MR. SARTAIN: Yeah.
>
> [Defense Counsel]: You want to?
>
> MR. SARTAIN: You bet.
>
> [Defense Counsel]: Okay. You don't have to. You have the right to testify or the right to choose not to testify. You can have a conversation, I mean we can take a minute or two and you can have a conversation with me about whether you actually want.
>
> MR. SARTAIN: Yeah, I think that would be fair.

(3/19/2009 Tr. at 135.)

From the comments above, it is fair to infer that prior to this time; Sartain's attorney had not discussed with Sartain whether he would testify. From the comments above, it appears Sartain's attorney is describing this critical right for the first time and while on the record. While the final decision as to whether a defendant will be called to testify is often not made until the close of the State's evidence, this is not when the issue should first be discussed. If the accused is going to take the stand, especially an accused with a prior criminal history, competent representation requires that a considerable amount of time be devoted to preparing the accused to take the stand--well before he actually takes the stand.

This Court has recognized that "an accused who is locked up is hindered in his or her ability to gather evidence, contact witnesses, or otherwise prepare his or her defense[.]" *Ariegwe*, ¶ 113. This form of prejudice is especially acute in a situation where there is a lack of communication between counsel and the defendant, a situation in this case which was clearly exacerbated by the delay.

4. Balancing

With respect to balancing, the Supreme Court explained in *Barker*:

> We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must

> be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Barker, 407 U.S. at 533.

In the present case, applying the analysis in *Arigewe*, the State must make a highly persuasive showing that Sartain was not prejudiced by the delay while the quantum of proof that may be expected of Sartain under this factor is correspondingly lower. Sartain's testimony of conditions of his pretrial incarceration is highly persuasive of prejudice. Cases that find no prejudice to the defendant are uniformly those where the defendant has served little or no time in pretrial incarceration. *See e.g.*, *Ariegwe* (of the 404 days of delay, Ariegwe spent four days incarcerated).

The length of delay in this case (357 days) weighed in favor of Sartain. Most of the delay (332 days) was attributed to the State. Only 25 days were attributed to Sartain. As to the reason for delay, it bears repeating that the State originally represented that it was ready to prosecute this case in three hours with two witnesses. (8/11/08 Tr. at 22.) The 357 day delay that did occur benefited the State considerably, in that the State went from two witnesses to seven. If Sartain had defense witnesses available to him, they were not presented by his attorney.

Finally, as to the accused's response to the delay, the district court erroneously concluded that the lack of objection from an incarcerated defendant not transported to any pretrial hearings could be used to infer acquiescence in the

delay. While it may not always be necessary to obtain a written waiver of the right to a speedy trial from an incarcerated defendant, certainly this would have been the better practice in view of the questionable comments and representations made by defense counsel in this case.

In short, a balancing of the four factors compels the conclusion that Sartain's right to a speedy trial was violated in the present case. Once a violation has been shown, dismissal is the only proper remedy. *State v. Fife*, 193 Mont. 486, 632 P.2d 712 (1981); *see also*, *Strunk v. United States*, 412 U.S. 434 (1973).

II. SARTAIN DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

In the event that this Court does not dismiss this case for a violation of Sartain's right to a speedy trial, then Sartain requests that this Court reverse his conviction due to the ineffectiveness of his trial counsel.

A. Standard of Review

Ineffective assistance of counsel claims constitute mixed questions of law and fact which this Court reviews de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861. In considering ineffective assistance of counsel claims on direct appeal, this Court applies the two-pronged standard of review set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984); see *Hagen v. State*, 1999 MT 8, ¶ 10, 293 Mont. 60, 973 P.2d 233.

Under the *Strickland* test, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Hagen*, ¶ 10.

Under the first prong of *Strickland*, the question which must be answered is whether counsel's conduct fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances. *Whitlow*, ¶ 20. The second prong of *Strickland* requires the Court to assess whether there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Importantly, prejudice may result from a single error or from the cumulative impact of multiple deficiencies. *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979).

Where ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal; conversely, where the allegations of ineffective assistance of counsel cannot be documented from the record in the underlying case, those claims must be raised by petition for postconviction relief. *Hagen*, ¶ 12; *see also*, Mont. Code Ann. § 46-21-105(2). Generally, a failure to object to the introduction of evidence, testimony of a witness or to prosecutorial misconduct at trial has been deemed record-based, and appropriate for direct appeal. See *Hagen*, ¶ 19.

B. Discussion

1. Counsel's Performance Was Deficient.

To determine whether Sartain was deprived of effective assistance of counsel when his trial counsel a) failed to seek a Wade hearing challenging the suggestiveness of the show-up identification, b) failed to file a motion challenge the legality of his arrest, and c) failed to move to suppress statements made by Sartain following his warrantless arrest, first requires an examination into the principles that would have been applied if the proper motions had been filed.

a. Trial Counsel Was Ineffective For Failing to Challenge Show-up Identification.

The due process guarantees of the federal and state constitutions, at their very core, require a criminal justice system designed to generate reliable determinations. As a result, due process principles prohibit the use of identification evidence produced by events that are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. United States*, 390 U.S. 377, 384 (1968). In the final analysis, a conviction that "rests on a mistaken identification" constitutes "a gross miscarriage of justice." *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

The "vagaries of eyewitness identification," as explained by Justice Brennan in his opinion for the Court in *Wade*, are "well-known," and "the annals of criminal law are rife with instances of mistaken identification." "A major factor"

contributing to mistaken identification has been "the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *United States v. Wade*, 388 U.S. 218, 228 (1967).

Since eyewitness testimony plays an influential role in many criminal prosecutions, implicit in the applicable legal principles is a heightened concern about the reliability of such evidence. This deepening concern is warranted particularly because, as has been recognized by courts in other states, empirical studies now suggest that juries "tend to place great weight on eyewitness identifications, often ignoring other exculpatory evidence," and because the degree to which a witness expresses confidence in an identification also tends to be unduly valued by juries. *See e.g.*, *State v. Delgado*, 902 A.2d 888 (N.J. 2006). Eyewitness identification can be the most powerful evidence presented at trial, but it can be the most dangerous too. As quoted by the Supreme Court of New Jersey in *Delgado*, "All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'That's the one!'" *Delgado*, 902 A.2d at 895 (internal citations omitted). Misidentification has now been identified as "the single greatest cause of wrongful convictions in this country." See Timothy P. O'Toole & Giovanna Shay, Manson v. Brathwaite Revisited: Towards a New

Rule of Decision for Due Process Challenges to Eyewitness Identification Procedures, 41 Val. U.L.Rev. 109 (2006).

In Montana, this Court has recognized that due process protects the accused from identification (whether pre-trial or in-court) tainted by unreliable and unnecessarily suggestive procedures. *See e.g.*, *State v. Lally*, 2008 MT 452, ¶¶ 14-15, 348 Mont. 59, 199 P.3d 818. Well over twenty years ago, this Court cautioned that "[l]aw enforcement agencies would be ill advised to rely solely on one-to-one showups in identifying suspects with a crime." *State v. Campbell*, 219 Mont. 194, 201, 711 P.2d 1357, 1362 (1985).

The show-up identification in this case was text book unreliable. Sartain was arrested, he was handcuffed, he was "stuffed" into a patrol car, he was brought to the crime scene to be viewed by witnesses who had been told that the police had caught "the suspect" and Sartain was the only "suspect" the witnesses were ever shown.[2]

Sartain's counsel did not object to the out-of court or in-court identification of Sartain either before, or at trial. This error was compounded during counsel's cross-examination of Hop where trial counsel elicited Hop's assurances that he was "absolutely 100 percent positive that Mr. Sartain was the individual in [his]

[2] Without objection, the prosecutor used the "stuffed" phrasing to describe Sartain's arrest during his closing argument. (3/18/09 Tr. at 176.)

house." (3/18/09 Tr. at 135.) This error was again compounded by trial counsel's lackluster closing argument, which instead of drawing attention to the fact there was only one true "eye-witness" to the crime; incorrectly informed the jury that there were four:

> I'm not sure how that works, Now, the State has presented you with four eyewitnesses that have inconsistent descriptions and they can't identify Mr. Sartain – or couldn't identify him at the scene and then come to Court and all the sudden can identify him. I'm not quite sure how that works a year later.

(3/18/2009 Tr. at 187, emphasis added.)

Sartain's counsel did request a jury instruction on the unreliability of eyewitness identification, but during closing, failed to adequately draw attention to this instruction:

> So I encourage you to go back there and take a good look at the State's evidence, take a look at his eyewitness testimony, **read the jury instructions because they're helpful**, and at the end of the day find Mr. Sartain is innocent. He was in the wrong place at the wrong time. Not guilty. I thank you for your time.

(3/18/2009 Tr. at 189, emphasis added.)

The existing record demonstrates that Sartain could have persuasively attacked the reliability of the identification pre-trial and should have attacked the admissibility of the in-court identification. At trial, Hop admitted that the view of the intruder in his home was only "[a]s good a look as you get in a blink of an eye." (3/17/09 Tr. at 124.) Hop saw the intruder in his home as he was turned

back to look at him from 30 feet away. (3/17/09 Tr. at 124-25.) At the trial, Hop ostensibly identified Sartain's "eyes" and not Sartain, himself. (3/17/09 Tr. at 89.) Hop admitted that since the incident, he had seen photos of Sartain on television and corrected counsel that "[f]rom the police mug shot on the TV it looks like he's 5'8." (3/17/09 Tr. at 115, 118.)

At the same time, Hop was not able to tell if Sartain was "clean-shaven" or had a goatee, as was actually the case. (3/17/09 Tr. at 120; *see also*, Exhibit A.) When the issue was whether Hop justifiably shot his pistol at the intruder in his backyard as the intruder was running away, Hop's ability to make observations was not as pronounced. When asked if the intruder had something in his hand, Hop testified: "Couldn't tell you what it was, if it was a pistol, a stabbing weapon, if it was my jewelry. I couldn't see it clearly." (3/17/09 Tr. at 92.)

Under the circumstances of this case, defense counsel's failure to file a pre-trial motion challenging the show-up identification and to challenge any subsequent identification tainted by that process fell below an objective standard of reasonableness measured under prevailing professional norms and in light of the surrounding circumstances. The trial in this case turned on eyewitness testimony, and there was no question that Sartain was prejudiced by his counsel's failure to adequately challenge this evidence.

b. Trial Counsel Was Ineffective For Failing to Challenge the Warrantless Arrest.

Pursuant to the Fourth Amendment to United States Constitution and Article II, Section 11 of the Montana Constitution, a warrantless arrest requires probable cause. Montana Code Annotated § 46-6-311(1) provides that "[a] peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest." Probable cause to arrest exists when the facts and circumstances within a police officer's personal knowledge, or related to the officer by a reliable source, are sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense. *State v. Williamson*, 1998 MT 199, ¶ 12, 290 Mont. 321, 965 P.2d 231. Although probable cause does not require evidence sufficient to prove a person's guilt, the standard involves something more than an officer's mere suspicion of criminal activity. *Williamson*, ¶ 12.

In the present case, Officer Klumb testified as to his arrest of Sartain. (3/17/09 Tr. at 189.) At the time he arrested Sartain, Officer Klumb had information that Sartain was "running" or "trotting" down the sidewalk and that he was "wearing clothing matching the general description of the individual that we were given." (3/17/09 Tr. at 223.) Officer Klumb also had information that another individual observed Sartain jump a fence and cut through a yard. (3/17/09

Tr. at 189.) With this information, Officer Klumb testified that he pulled up to Sartain, "as fast as I could, had the door opened before I had my car in park, hit the brakes slid to a stop, exited my patrol vehicle as quick as I could. I had my weapon drawn, I pointed it at the suspect." Following this dramatic stop, the officer testified that (un-surprisingly) Sartain was "breathing hard as if he had been running[,]" and he could "actually feel his heartbeat." (3/17/09 Tr. at 190-91.)

At the time Sartain was placed under arrest, Officer Klumb did not have a warrant, nor did he have probable cause to believe that Sartain had committed an offense and existing circumstances required an immediate arrest. Trial counsel should have filed a motion challenging Sartain's illegal arrest, and his failure to do so fell below an objective standard of reasonableness.

c. Trial Counsel Was Ineffective For Failing to Move to Suppress Statements Given by Sartain Following His Illegal Arrest.

After Sartain was arrested, he was transported to the Law and Justice Center where he provided a statement to law enforcement. (3/17/09 Tr. at 238.) Sartain's statement was used against him extensively at trial. (*See e.g.*, 3/17/09 Tr. at 6, 12; 3/18/09 Tr. at 177.)

Sartain's trial counsel did not move to suppress the statement given by Sartain following his illegal arrest. *See e.g.*, *State v. Van Dort*, 2003 MT 104, 315 Mont. 303, 68 P.3d 728 (suppression of statement as exploitation of illegal arrest).

Again, the error in failing to suppress the statement was compounded by his counsel's actions at trial. During closing argument, Sartain's counsel referred to Sartain's statement as "the Defendant's story[.]" When discussing Sartain's statement during closing, counsel stated:

> But for a moment let's just take a look at this and think about the Defendant's story here, which I think, well, it's kind of jumbled up a little bit in testimony, and it kind of came out through Detective Knight.

Not only do counsel's comments impermissibly draw attention to the fact that his client did not testify at trial, counsel refers to his client's statement in such a way as to undermine its credibility. Measured under prevailing professional norms and in light of the surrounding circumstances, Sartain was prejudiced by his counsel's failure to suppress any statements he may have made following his illegal arrest.

d. Trial Counsel Was Ineffective For Failing to Object to Improper Remarks and Closing Arguments of the Prosecutor.

Both the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee criminal defendants the right to a fair trial by a jury. A prosecutor's misconduct may be grounds for reversing a conviction and granting a new trial if the conduct deprives the defendant of a fair and impartial trial. *Clausell v. State*, 2005 MT 33, ¶ 11, 326 Mont. 63, 106 P.3d 1175.

In *State v. Lindberg*, 2008 MT 389, 347 Mont. 76, 196 P.3d 1252, this Court found that trial counsel's failure to object to the prosecutor's closing arguments fell below an objective standard of reasonableness under prevailing professional norms in light of the circumstances of the case. As noted by this Court: "We simply cannot conceive of any rationale under which defense counsel would sit on his hands and fail to object to such comments." *Lindberg*, ¶ 47.

The prosecutor in the present case made several objectionable comments, none of which were objected to by defense counsel. The prosecutor asked the investigating officer if here was "any doubt" that what he testified to was: "the truth." (Tr. 3/17/09 at 226.) The prosecutor also repeatedly referred to the witnesses at trial as direct "eye-witnesses" when three of those witnesses were not direct witnesses to the crime. Most problematic, was the prosecutor's closing argument, wherein he disparaged defense counsel and criminal defense attorneys in general:

> I'll give credit where credit is due. [Defense counsel] is a wonderful defense attorney. I have the utmost respect for him. **A criminal defense attorney's job, if it's anything, is to muddy the waters. Muddy the waters, create confusion, and he did a good job of that.** But at the end of the day there are four people involved in this, they are direct eyewitnesses. . . .

(3/18/09 Tr. at 170, emphasis added.)

Disparaging remarks directed toward defense counsel "have absolutely no place in a courtroom, and clearly constitute misconduct." And it is not only

improper to disparage defense counsel personally, but also to disparage legitimate defense tactics. *See e.g.*, *McGuire v. State*, 677 P.2d 1060, 1063-64 (Nev. 1984). In the present case, there is no conceivable rationale under which defense counsel would "sit on his hands and fail to object to such comments." *Lindberg*, ¶ 47.

2. Sartain Was Prejudiced by His Counsel's Performance.

The second prong of an ineffective assistance of counsel claim requires this Court to determine whether the defendant was prejudiced by counsel's deficient performance. In order for a defendant to show that he was prejudiced, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Yecovenko v. State*, 2007 MT 338, 340 Mont. 251, 173 P.3d 684. A reasonable probability is a lower standard of proof than a preponderance of the evidence. *Cooper-Smith v. Palmateer*, 397 F.3d 1236, 1243 (9th Cir. 2005).

In cases where "there are a number of errors at trial, 'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir.1996). In other words, "[e]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting

that is fundamentally unfair." *Thomas v. Hubbard*, 273 F.3d 1164, 1180 (9th Cir. 2001).

In the present case, Sartain has satisfied the second prong of the *Strickland* test. He has shown that the errors of counsel, alone or cumulatively, resulted in a trial that was fundamentally unfair and are sufficient to undermine confidence in the verdict. Upon review of the record, it is clear that counsel's errors resulted in prejudice, the absence of which could have reasonably have resulted in a different outcome. Sartain received ineffective assistance of counsel that prejudiced his defense, and he is entitled to a new trial.

CONCLUSION

Sartain respectfully requests this Court dismiss the proceedings in violation of his right to a speedy trial. The district court's findings and conclusions that Sartain had acquiesced in the delay and was not prejudiced by the delay are clearly erroneous.

In the event that this Court does not dismiss the proceedings as in violation of his right to speedy trial, Sartain asks this Court to vacate his conviction based on the ineffective assistance of his trial counsel and to remand for a new trial.

Respectfully submitted this ____ day of March, 2010.

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By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Appellant's opening brief to be mailed to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words (exactly 9902), not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

NANCY G. SCHWARTZ

APPENDIX